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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MICHAEL BERLIN,

Plaintiff and Appellant,

v.

PACIFIC WESTERN BANK,

Defendant and Respondent.

B186022

(Super. Ct. No. BC 299335)

APPEAL from a judgment of the Superior Court of Los Angeles County.

George H. Wu, Judge. Affirmed.

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Robert Gentino for Plaintiff and Appellant.

Law Offices of William H. Newkirk, William H. Newkirk and Jill P. McDonnell  
for Defendant and Respondent.  
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Michael Berlin appeals from the trial court's judgment on his conversion claim against Pacific Western Bank, formerly First Charter Bank (First Charter). The court awarded Berlin \$28,503.12, but Berlin contends that the court calculated his damages improperly and should have awarded him prejudgment interest. We affirm.

### BACKGROUND

In 1995, Berlin retained attorney Roger Kander to represent him on a contingent-fee basis in an uninsured motorist matter. In 1999, Berlin discharged Kander and retained William Newkirk in his place, but no new retainer agreement was ever prepared or signed. Newkirk pursued Berlin's claim through arbitration and, in January 2001, obtained an award of \$219,313, plus costs. A few months later, the defendant in the arbitration sent Newkirk a check payable to Berlin, Newkirk, and Kander, in the amount of \$223,458.92, which represented the full amount of the award plus interest.

Kander submitted an attorneys' fees lien for \$29,009.68, but Newkirk negotiated the amount down to \$23,362.30. Kander also authorized Newkirk to endorse the award check for him.

On April 10, 2001, Newkirk endorsed the award check for himself, for "Michael Berlin by P/A William Newkirk[,] and for "Roger Kander by P/A William Newkirk." First Charter permitted Newkirk to deposit the full amount of the check into his client trust account. Newkirk then sent \$140,593.50 to Berlin and retained the remaining \$82,865.42 to cover his and Kander's fees.

Berlin then filed suit against Newkirk, Newkirk's law partner and their firm, and First Charter. Berlin alleged claims for both conversion of instrument under Commercial Code section 3420<sup>1</sup> and fraud. Berlin's claims were based, in part, on the allegation that Newkirk did not have power of attorney to endorse the award check on Berlin's behalf.

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<sup>1</sup> All further statutory references are to the Commercial Code unless otherwise indicated.

In his opening brief on appeal, Berlin represents that Newkirk cross-complained for his attorneys' fees in quantum meruit, and that the trial court "granted [Berlin's] motion for judgment against the cross-complaint" because the quantum meruit claim was untimely. The record on appeal does not contain a cross-complaint filed by any party, nor does it contain any motion, ruling, or judgment concerning any such cross-complaint. The trial court's docket does contain references to one or more cross-complaints, including references to a motion for judgment on the pleadings as to the cross-complaint of Newkirk, but the docket does not indicate either the substance of the cross-complaint, the ruling on the motion, or the ruling's basis.

After a bench trial, the court rejected Berlin's fraud claim against Newkirk but found in favor of Berlin on his claim for conversion of instrument against First Charter. To calculate Berlin's damages, the court applied subdivision (b) of section 3420, which limits recovery to "the amount of the plaintiff's interest in the instrument." From the \$223,458.92 face amount of the check, the court deducted (1) \$140,593.50, which Newkirk had originally paid to Berlin, (2) \$23,362.30 in attorneys' fees for Kander, and (3) \$31,000.00 in attorneys' fees for Newkirk, leaving Berlin with recoverable damages in the amount of \$28,503.12. The amount of Kander's fees was determined by the agreement Newkirk had negotiated with Kander. The court determined the amount of Newkirk's fees by applying the lodestar method, which required the court to resolve various legal and factual disputes concerning, e.g., the number of hours worked, the hourly rate, and the application of a discount to the total fee.

The court then entered judgment against First Charter for \$28,503.12, plus costs, and the court rejected Berlin's request for prejudgment interest. Berlin timely appealed.<sup>2</sup>

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<sup>2</sup> Berlin's appeal relates only to his conversion claim against First Charter, and the judgment disposes of that claim. Because Berlin alleged no other claims against First Charter, the judgment is final as to First Charter, so it is appealable by either party. (*Tinsley v. Palo Alto Unified School Dist.* (1979) 91 Cal.App.3d 871, 880.)

## DISCUSSION

### I. Mutuality of Parties Was Not Required.

Berlin argues that the trial court should have awarded him the full face amount of the converted check without any deductions for Newkirk's and Kander's fees, because a set off requires mutuality of parties. According to Berlin, "[b]ecause any money owed by Appellant to Kander or Newkirk was not owed to [First Charter], [the] court may not set[ ] off these claims to reduce [First Charter]'s liability to Appellant."

The argument fails because the trial court's calculation of Berlin's damages did not involve a set off. Rather, it involved application of a statutory cap on Berlin's recoverable damages, namely, the requirement in subdivision (b) of section 3420 that Berlin's recovery be limited to Berlin's interest in the converted check. In order to calculate Berlin's interest, the trial court determined the interests of the other payees and deducted them (as well as the amount already paid to Berlin) from the face amount of the check. Contrary to Berlin's argument, for which he cites no authority, the absence of valid attorneys' fees liens does not mean that Newkirk and Kander had no interest in the check.

Mutuality of parties was not required, because the court was not setting off Newkirk's and Kander's claims against Berlin's. It was simply calculating Berlin's recoverable damages in the manner required by statute.

### II. Berlin Was Not Entitled to Prejudgment Interest.

Berlin contends that the trial court erred when it denied his request for prejudgment interest. We disagree. Berlin would have a right to prejudgment interest only if he were a "person who is entitled to recover damages certain, or capable of being made certain by calculation . . . ." (Civ. Code, § 3287, subd. (a).) "Thus, where the amount of damages cannot be resolved except by verdict or judgment, prejudgment interest is not appropriate." (*Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 960.) Berlin's damages were limited to Berlin's interest in the converted check. That interest could not be determined without first calculating the

amount of Newkirk's fees, and that calculation required judicial resolution of various factual and legal disputes—even application of the lodestar method itself (instead of a percentage of the arbitration award) was disputed. Because the amount of Berlin's damages could not be resolved except by verdict or judgment, his damages were not certain or capable of being made certain by calculation. The trial court therefore did not err in denying Berlin's request for prejudgment interest.

### III. Berlin's Argument Based on Newkirk's Cross-Complaint Fails.

Berlin argues that because the trial court determined that Newkirk's cross-complaint for attorneys' fees was untimely, the court should not have set off Newkirk's fees against Berlin's recovery on his conversion claim against First Charter. The argument fails because Berlin has not provided an adequate record to support it. (*Rancho Santa Fe Assn. v. Dolan-King* (2004) 115 Cal.App.4th 28, 46.) The record before us does not contain Newkirk's cross-complaint, Berlin's motion for judgment on the pleadings, or the trial court's ruling. Thus, we cannot verify either that the cross-complaint concerned attorneys' fees or that Berlin's motion was granted.

In any event, Berlin's argument also fails on the merits, for the reasons stated in part I, *ante*. The trial court did not set off Newkirk's cross-claim against Berlin's recovery. Rather, the trial court calculated Berlin's damages by determining his interest in the converted check, as required by statute. It would make no difference if, as Berlin argues, a claim by Newkirk to recover his interest would be time-barred. The point is that Berlin can recover *only his interest*, regardless of whether the other payees are capable of recovering theirs.

## DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, Acting P. J.

VOGEL, J.